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# COMBATING FAKE NEWS IN SOCIAL MEDIA: U.S. AND GERMAN LEGAL APPROACHES

RYAN KRASKI<sup>†</sup>

## INTRODUCTION

In searching for a means to combat fake news, one will most likely come across a wide variety of options that have nothing to do with the law. Recommendations that journalists heighten their standards or that their audiences consume news more critically are commonplace. Fake news is, in and of itself, worthy of being eradicated; it misleads the public discourse on any number of topics, injures reputations, misleads consumers, and is often done so with impunity. But, this Article does not concern these general societal concerns or humanities-based methods; this Article approaches only the narrow category where fake news creates *legally recognizable injuries* for individuals or society as a whole. Arising out of these intrusions into personal rights and collective laws is a large body of preexisting law capable of combating fake news both in Germany and the United States.<sup>1</sup>

“Fake news” refers to untrue stories, factually warped reports, or otherwise nonexistent events which represent “statements of fact” as being real, that is, not parody or some form of opinion, in a pseudo-journalistic manner. The most fundamental element of fake news is that the stories make

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<sup>1</sup> Note that the legal confrontation of fake news can summon a number of different legal areas including, but not limited to: Tort Law, Criminal Law, Intellectual Property Law, Commercial Law, Election Law, as well as Constitutional Law. Due to the extensive discussion deserved in all of these areas, some, such as Commercial, Election and Intellectual Property Law are not generally covered, but may be still mentioned when relevant to other included areas.

assertions which are not based on objectively verifiable fact. This sort of “reporting” shall be referred to as fake news regardless of whether its deceptiveness arises intentionally, knowingly, or recklessly.<sup>2</sup>

The impact of the recent social media revolution cannot be understated; it is estimated that there are 2.46 billion social media users worldwide.<sup>3</sup> These users can communicate with one another and generate content, often in the form of text, photos, audio files, and videos.<sup>4</sup> There is a broad array of social media: social networks such as Facebook serve as communication platforms, instant messengers such as WhatsApp allow for groups to be instantly contacted en masse, blogs allow content generation and commentary from users, wikis are websites collectively edited by users, webfora are virtual discussion rooms for particular topics, and review websites allow users to provide commentary on goods, services, other people.<sup>5</sup>

Fake news is nothing new; the early Catholic Church punished defamation as a sin as early as the fourth century.<sup>6</sup> In ninth century England, slanderers' tongues could be cut out as a punishment.<sup>7</sup> Defamation laws started to come into their modern form following the fifteenth century invention of the printing press and the expanded flow of information that accompanied it.<sup>8</sup> With the advent of new technologies, defamation and other speech-oriented causes of action have evolved alongside. Many of

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<sup>2</sup> Recovery may be available following a negligently made false statement, but this is not within the central focus of this Article.

<sup>3</sup> *Number of Social Media Users Worldwide from 2010 to 2021*, STATISTA, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited Mar. 29, 2018).

<sup>4</sup> Jennifer Alejandro, *Journalism in the Age of Social Media* 3 (2010) (unpublished Reuters Institute Fellowship Paper, University of Oxford), <http://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Journalism%2520in%2520the%2520Age%2520of%2520Social%2520Media.pdf>.

<sup>5</sup> ROLF SCHWARTMANN & SARA OHR, *RECHT DER SOZIALEN MEDIEN* 7–11 (2015).

<sup>6</sup> Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 550 (1903).

<sup>7</sup> *Id.* at 549 (noting the policy of the English King Alfred).

<sup>8</sup> *Id.* at 547–48; *see id.* at 555 (explaining that early remedies against defamation were first provided in order to suppress dueling, which had been a common means for vindication); *see also* Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J. L. & ARTS 17, 25–26 (2011) (explaining that, during the Middle Ages, defamatory statements practically always occurred through spoken word, thus first giving birth to the claim for slander; its counterpart, libel, came into existence after the creation of the printing press).

these traditional concepts can be implemented to combat the propagation of fake news in social media, but, in a number of cases, the law will, once again, require an evolution.

When asking how fake news in social media can be combated under U.S. and German law, one must first take the systems' most fundamental differences into consideration. U.S. law is characterized by its federal structure, the interaction of state laws often with the federal, U.S. Constitution, usage of pretrial discovery, as well as the role of juries in calculating damages.<sup>9</sup> In contrast, Germany, as a civil law system, is characterized by its usage of separate legal actions to acquire information, lack of pretrial discovery, and broader array of available remedies, none of which allow for punitive damages.<sup>10</sup> Through a brief analysis of these systems' procedures, causes of action, and remedies, it will become apparent that the U.S. system takes an approach leading to more frequent and higher value damage awards. Germany, in contrast, makes greater usage of its other available remedies. This Article sets out to demonstrate the available legal tools for combating fake news in social media.

## I. BACKGROUND TO FAKE NEWS

### A. *Syrian Refugee Defamed in German Social Media*

In September 2015, a Syrian refugee in Berlin took a "selfie" with German Chancellor Angela Merkel.<sup>11</sup> Following the 2016 terrorist bombings in Brussels and attempt by a number of young refugee men in Berlin to set a homeless man on fire, this selfie was edited by anonymous Internet users and posted on Facebook.<sup>12</sup> The edits and captions falsely reported that this young man, pictured with Chancellor Merkel, was a terrorist involved in these horrendous acts.<sup>13</sup> He brought suit against Facebook seeking an injunction, demanding Facebook remove any content connecting him to terrorist activities.<sup>14</sup>

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<sup>9</sup> Alexander Bruns, *Access to Media Sources in Defamation Litigation in the United States and Germany*, 10 DUKE J. COMP. & INT'L L. 283, 283–84 (2000).

<sup>10</sup> *Id.*

<sup>11</sup> LG Würzburg March 7, 2017, 11 O 2338/16 UVR, <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2017-N-103822?hl=true>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

In denying the merits of his claim against Facebook, the Würzburg District Court made clear that social media networks, such as Facebook, are typically neither content creators nor collaborators in specific acts of defamation.<sup>15</sup> Thus, functioning only as service providers, in the context of the German Teleservices Act, service providers cannot be obligated to proactively search through all of the content published on their platforms and to delete content that is defamatory, or otherwise affecting an individual's rights.<sup>16</sup> Furthermore, providers are not obligated to create the complex and costly systems to monitor content and prevent future publications, as the plaintiff requested.<sup>17</sup> Only upon notification by the injured party to the provider that there is a specific instance of illegal content posted is the provider obliged to remove the content.<sup>18</sup>

### B. Pizzagate

In the midst of the 2016 U.S. presidential election, Americans took to social media to debate any number of political issues, as well as to inform themselves about the candidates. Sometime around October 2016, anonymous Twitter accounts began posting, falsely, that former democratic politician Anthony Weiner's laptop was recovered by the FBI, and that it contained proof of his involvement in child sexual abuse.<sup>19</sup> The online rumors spread further to engulf Hillary Clinton, as well as her campaign manager John Podesta.<sup>20</sup> Mr. Podesta's emails were hacked and published on WikiLeaks; online conspiracy theorists were quick to draw a connection between his frequent references to "pizza" and "cheese" and their belief that it was code words for pedophile activities.<sup>21</sup> Eventually, the rumors progressed to the

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (citing Telemediengesetz [TMG] [Telemedia Act], Feb. 26, 2007, BGBl. I at 179, § 10 (Ger.)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Andrew Griffin, *What is Pizzagate? The Hillary Clinton Conspiracy Theory that Led to a Man Opening Fire in a Restaurant*, INDEPENDENT (Dec. 5, 2016, 12:31 PM), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/pizzagate-what-is-it-explained-hillary-clinton-paedophile-conspiracy-gunman-fake-news-a7456681.html>.

<sup>20</sup> *Id.*

<sup>21</sup> James Alefantis, *What Happened When 'Pizzagate' Came to My Restaurant*, WASH. POST (Apr. 20, 2017), <https://www.washingtonpost.com/opinions/pizzagate->

point of suggesting that Mrs. Clinton, Mr. Podesta, and a number of others were running a child-slavery ring out of the basement of a Washington D.C. pizzeria, Comet Ping Pong.<sup>22</sup> Beyond the chat rooms and other social media platforms playing host to this conspiracy theory, a number of “alt-right” oriented broadcasters, such as Alex Jones, propagated these lies.<sup>23</sup>

Comet’s owner was inundated with death threats, service review websites were flooded with extremely negative reviews, their telephone line was constantly tied up with harassing calls until they unplugged it entirely, the workers’ photos and home addresses were posted on social media, labeling them as criminals, not to mention the harassment inflicted on their friends and families.<sup>24</sup> On December 4, 2016, Edgar Maddison Welch walked into the pizzeria wielding both a loaded AR-15 rifle and .38 caliber pistol.<sup>25</sup> After firing off three shots and then pointing his weapons at some employees, Mr. Welch peacefully surrendered himself to the police.<sup>26</sup> He later admitted that he was persuaded by the conspiracy theorists’ calls for “self-investigation.”<sup>27</sup> This disastrous outcome was met mostly by conspiracy theorists doubling-down on their false assertions, as well as an apathetic apology by online protagonist Alex Jones.<sup>28</sup> Even as long as a year later, defamatory reviews and inciting online theories can still be readily found.

### C. *Role of the Countries’ Constitutions*

The United States Constitution and the German Constitution (“German Basic Law”) function somewhat differently. As a foundational principle, the U.S. Constitution conforms to the “state action doctrine,” enabling and restraining

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taught-us-the-value-of-community/2017/04/19/92cae67c-23b0-11e7-bb9d-8cd6118e1409\_story.html?utm\_term=.a70236c54eee.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Complaint at 1–2, United States v. Welch, No. U16036846 (D.C. Super. Ct. Dec. 5, 2016).

<sup>26</sup> *Id.*

<sup>27</sup> Alefantis, *supra* note 21.

<sup>28</sup> Mack Lamoureux, *Alex Jones Is Very, Very Sorry for that Pizzagate Stuff*, VICE (Mar. 25, 2017, 1:58 PM), [https://www.vice.com/en\\_us/article/alex-jones-is-very-very-sorry-for-that-pizzagate-stuff](https://www.vice.com/en_us/article/alex-jones-is-very-very-sorry-for-that-pizzagate-stuff).

government powers.<sup>29</sup> These “negative” rights do not control the conduct of private individuals or organizations, but, rather, some form of government wrongdoing.<sup>30</sup> In other words, “only the state can violate an individual’s constitutional rights.”<sup>31</sup> Because of the state-action requirement, plaintiffs wishing to enforce individual rights must first establish that the wrongdoer was a public actor, that is, he was performing either an act on behalf of the state or one that would be traditionally carried out by the state.<sup>32</sup> While the German Basic Law, on its face, also requires state action, the courts have extended some causes of action arising under the Basic Law to be accessible by private plaintiffs (*mittelbare Drittwirkung der Grundrechte*).<sup>33</sup> This means that injured plaintiffs may be able to invoke constitutional rights against other private individuals.<sup>34</sup> Furthermore, the “positive rights” arising under the German Basic Law can require the state to take specific action in some instances.<sup>35</sup>

## II. FIRST AMENDMENT OF THE U.S. CONSTITUTION

The First Amendment of the United States Constitution states that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”<sup>36</sup> But this provision only provides individual protection against laws made by “Congress,” the federal legislature. In 1868, the Fourteenth Amendment was ratified and states, in relevant part, that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”<sup>37</sup> In *Whitney v. California*, Justice Brandeis further elaborated that “all fundamental rights comprised within the term liberty are protected by the federal

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<sup>29</sup> John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 575 (2005).

<sup>30</sup> *Id.* But see U.S. CONST. amend. XIII (prohibiting slavery and involuntary servitude; this is the only “positive” right found in the U.S. Constitution).

<sup>31</sup> Joshua Crawford, Note, *Importing German Defamation Principles: A Constitutional Right of Reply*, 41 FLA. ST. U. L. REV. 767, 769 (2014).

<sup>32</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

<sup>33</sup> BVerfG, Jan. 15, 1958, BVerfGE 7, 198 (Ger.), <http://germanlawarchive.iuscmp.org/?p=51>.

<sup>34</sup> Crawford, *supra* note 31, at 769.

<sup>35</sup> *Id.*

<sup>36</sup> U.S. CONST. amend. I.

<sup>37</sup> U.S. CONST. amend. XIV, § 1.

Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.”<sup>38</sup>

The Supreme Court made it clear that not all speech is of equal importance; speech concerning “public issues” is regarded as the “highest rung of the hierarchy of First Amendment values,” and is afforded special protection accordingly.<sup>39</sup> “In contrast . . . matters of purely private concern [are] of less First Amendment concern.”<sup>40</sup> Speech on purely private matters does not garner the same level of constitutional protection as speech on matters of public interest, because “‘there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas’; and the ‘threat of liability’ does not pose the risk of a ‘reaction of self-censorship’ on matters of public import.”<sup>41</sup> It is this initial public-private distinction that determines the level of protection afforded by the First Amendment as a defense against all speech-oriented claims.

In addition to analyzing the government’s attempts to regulate the content of speech, its attempts to restrict speech prior to, simultaneously with, or subsequent to the actual speech must also be taken into consideration. All of the following laws have been found to be unconstitutional: prior restraints on speech, requiring a permit at the outset,<sup>42</sup> the impoundment of receipt or royalty proceeds, burdening the speaker,<sup>43</sup> the subsequent issuance of civil damages for speech regarding a public official,<sup>44</sup> as well as the speaker being subject to criminal penalties without inciting an “imminent lawless action.”<sup>45</sup> These forms of restriction on speech have consistently been struck down, but the First Amendment’s “fullest and most urgent

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<sup>38</sup> 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

<sup>39</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

<sup>40</sup> *Id.*

<sup>41</sup> *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 760).

<sup>42</sup> *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165–66, 168 (2002).

<sup>43</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 123 (1991).

<sup>44</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

<sup>45</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).



application” is saved for political discourse.<sup>46</sup> Citizens’ right “to inquire, to hear, to speak, and to use information,” while informing themselves on political choices, “is a precondition to enlightened self-government and a necessary means to protect it.”<sup>47</sup> The First Amendment functions with an inherent mistrust of government power, thus explaining why courts are often quick to strike down restrictions on speech disfavoring certain subjects or viewpoints.<sup>48</sup> Laws burdening political speech are “subject to strict scrutiny,” placing the burden on the government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>49</sup> While restrictions imposing on “fundamental rights” and “suspect classes” of persons will almost always be struck down under strict scrutiny, the courts apply a lower standard to other forms of speech. Restrictions affecting commercial speech, for example, are scrutinized by the courts under the “rational basis test,” requiring that the individual first plead an infringement of their rights, and then the government, to show only that its law is “a rational way of furthering any legitimate governmental purpose.”<sup>50</sup> The rational basis standard is very lenient, and nearly every law scrutinized under it is upheld.<sup>51</sup>

### III. ESSENTIAL FREE SPEECH ARTICLES OF THE GERMAN BASIC LAW

Article 5 of the German Basic Law is comparable to the First Amendment of the United States Constitution.<sup>52</sup> Article 5, paragraph 1 sets forth that “[e]very person shall have the right freely to express and disseminate his opinions in speech, writing and pictures . . . . Freedom of the press and freedom of reporting

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<sup>46</sup> *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

<sup>47</sup> *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

<sup>48</sup> *Id.*; see also *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (striking down a content-based restriction); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978) (prohibiting restrictions that distinguished among different speakers and allowed speech by some but not others).

<sup>49</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

<sup>50</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 (2006) (internal quotation marks omitted).

<sup>51</sup> *Id.*

<sup>52</sup> GRUNDGESETZ [GG] [BASIC LAW], art. 5, translation at [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/).

by means of broadcasts and films shall be guaranteed. There shall be no censorship.”<sup>53</sup> Its limitations can be found in Article 5, paragraph 2, which states that “[t]hese rights shall find their limits in the provisions of general laws . . . and in the right to personal honor.”<sup>54</sup> In addition to the freedom of speech, the German Basic Law grants certain other rights not found in the U.S. Constitution.

Some of the important differences between the U.S. Constitution and German Basic Law can be found in the Basic Law’s first two articles. The Basic Law’s Article 1, which sets forth the inviolable protection of human dignity and human rights, is fundamental and interwoven with other individual protections.<sup>55</sup> Article 2 states: “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”<sup>56</sup> These are unique German rights arising out of the country’s recent history.

#### A. General Personality Rights

Following World War II, and with the fresh memory of its state-sponsored horrors, the drafters of the German Basic Law enshrined the protection of human dignity as one of the highest legal priorities.<sup>57</sup> Article 1’s protection of human dignity and human rights permeates the Basic Law, also providing the basis for the general protection of personality rights (*allgemeines Persönlichkeitsrecht*).<sup>58</sup> These general rights interpreted out of the Basic Law through Civil Code § 823 paragraph 1 should be distinguished from statutory rights enforced through § 823 paragraph 2 of the Civil Code; these will be discussed subsequently.<sup>59</sup> While the typical expectation in a civil law

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<sup>53</sup> *Id.* art. 5, para. 1.

<sup>54</sup> *Id.* art. 5, para. 2.

<sup>55</sup> *Id.* art. 1.

<sup>56</sup> *Id.* art. 2, para. 1.

<sup>57</sup> Nicole Jacoby, *Redefining the Right To Be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States*, 35 GA. J. INT’L & COMP. L. 433, 454 (2007).

<sup>58</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823, para. 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p3489](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3489) (Ger.); *accord* GRUNDGESETZ [GG] [BASIC LAW], art. 2, para. 1; *id.* art. 1, para. 1.

<sup>59</sup> *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823, para. 2 (allowing for civil liability to arise out of criminal, and other, statutes within the purview of paragraph 2).

system is that the law sprouts from legislative codification, Germany's protection of personality rights had a rather anomalous development through the Federal Supreme Court and Federal Constitutional Court's interpretations of the Basic Law, as well as the Civil Code.<sup>60</sup> Because the German Civil Code is silent on the protection of general personality rights, the Federal Supreme Court took the first steps in the 1954 *Schacht* decision to create civil liability for personality right infringements.<sup>61</sup> A newspaper's selective quotations from an author led to a publication that was misleading as to the author's opinions.<sup>62</sup> Upon review, the Court determined that the Basic Law's Articles 1 and 2 ought to be construed as substantive rights under the Civil Code.<sup>63</sup> The *Schacht* court, recognizing this right, allowed for the remedy of retraction.<sup>64</sup> Subsequent court decisions have dismissed the notion that the right of personality is a mechanism for the individual to control his public perception; rather, it is a tool for correcting false and misleading facts concerning an individual.<sup>65</sup>

Among the numerous types of rights identified under the general personality rights, perhaps protection of the individual honor (*Ehrenschutz*) is the most fundamental. Protection of the personal honor was formally recognized as being part of the general protection of personality rights in the Federal Constitutional Court's 1980 *Eppler* decision.<sup>66</sup> Prior to this, the individual honor was protected through Criminal Code provisions such as § 185's punishment for insults (*Beleidigung*).<sup>67</sup> The modern civil remedy primarily protects from violations of the

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<sup>60</sup> Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CALIF. L. REV. 1925, 1947 (2010).

<sup>61</sup> Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] [First Civil Division] May 25, 1954, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1404, 1954 (Ger.).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Schwartz & Peifer, *supra* note 60, at 1951 n.173 (noting the landmark Caroline von Monaco case).

<sup>66</sup> BVerfG, 1 BvR 185/77, Mar. 6, 1980, <https://www.telemedicus.info/urteile/All-gemeines-Persoenlichkeitsrecht/Zitate/194-BVerfG-Az-1-BvR-18577-Eppler.html>.

<sup>67</sup> STRAFGESETZBUCH [StGB] [PENAL CODE], § 185, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html). Maunz/Dürig/Grabenwarter, 81. Aufl. 2017, GG Art. 5, Abs. 1 Rn. 204–17.

reputation, negative depictions to others, and social standing.<sup>68</sup> Protection of the individual honor is governed by an objective standard.<sup>69</sup> In addition to protection of the individual honor, the courts have come to recognize the right to informational self-determination.<sup>70</sup>

The general personality rights, functioning as *lex generalis*, take a subsidiary role when there is a more specific, pertinent statute, *lex specialis*.<sup>71</sup> Before the general personality rights were recognized, there were, and still are, plenty of specific statutes, protecting particular aspects of the personality.<sup>72</sup> One example of these specific rights is § 23 of the Art Copyright Code, which creates general permissions to display private individuals in narrow categories, such as depictions of “contemporary history,” or if they are appearing incidentally in public places.<sup>73</sup> Further examples of specific personality protections include § 12 of the Civil Code,<sup>74</sup> which provides injunctions for unauthorized usage of persons’ names (*Namensrecht*), § 11 of the Copyright Code,<sup>75</sup> which protects authors’ intellectual and personal relationships to their works, as well as a vast array of rights arising out of the German Privacy Code.<sup>76</sup>

<sup>68</sup> *Rixecker in Säcker/Rixecker*, Münchener Kommentar zum BGB, 7. Aufl. 2015, Anhang zu § 12, Rn. 78–79.

<sup>69</sup> *Maunz*, *supra* note 67.

<sup>70</sup> Entscheidungen des Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 419, 1983 (Ger.); *see also* Case C-131/12, Google v. Agencia Española de Protección de Datos, (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN> (acknowledging Europeans’ right to be forgotten).

<sup>71</sup> *Lex Specialis Derogat Legi Generali*, RECHTSLEXIKON.NET, <http://www.rechtslexikon.net/d/lex-specialis-derogat-legi-general/lex-specialis-derogat-legi-general.htm> (last visited Mar. 29, 2018).

<sup>72</sup> *Rixecker*, *supra* note 68, at 83.

<sup>73</sup> KUNSTURHEBERGESETZ [KUNSTURHG] [ART COPYRIGHT ACT], Jan. 9, 1907, § 23, *translation at* [https://www.gesetze-im-internet.de/kunsturhg/\\_23.html](https://www.gesetze-im-internet.de/kunsturhg/_23.html) (Ger.).

<sup>74</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 12, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html).

<sup>75</sup> URHEBERPERSÖNLICHKEITSRECHT [URHG] [COPYRIGHT CODE], § 11, *translation at* [https://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html#p0056](https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0056).

<sup>76</sup> BUNDESDATENSCHUTZGESETZ [BDSG] [GERMAN PRIVACY CODE], § 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bds/englisch\\_bds.html#p0014](https://www.gesetze-im-internet.de/englisch_bds/englisch_bds.html#p0014).

*B. The Three Spheres of Protection*

In every claim concerning the general personality rights, the courts must consider which “sphere” of the individual’s personality was affected by the content.<sup>77</sup> Three spheres have been recognized: the “core sphere” (*Intimsphäre*), the “private sphere” (*Privatsphäre*), and the “social sphere” (*Individualsphäre*).<sup>78</sup> They do not function as isolated categories, but, rather, as a continuum graduating the intensity of legal protection based on which sphere has been affected.<sup>79</sup> In other words, the greater the intrusion into highly protected spheres, the greater requirement for protection of the affected legal rights and interests.

The core sphere concerns the most fundamentally untouchable aspects of private life: those relating most directly to the Basic Law Article 1’s protection of human dignity.<sup>80</sup> Thoughts and feelings, content from personal journals and letters, or details of one’s sexuality generally fall within the core sphere.<sup>81</sup> Principally, the core sphere receives such high protection that no intrusion can be legally justified.<sup>82</sup>

In contrast to the core sphere’s extensive protections, the protections of the private sphere are not treated absolutely.<sup>83</sup> The private sphere concerns the personal life, which others may have limited access to.<sup>84</sup> It can be thought of spatially; areas such as homes or partitioned-off areas of restaurants, where there is no expectation of being observed, correspond with the private sphere.<sup>85</sup> Additionally, when private matters are brought into the public realm, they may then be considered within the

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<sup>77</sup> *BeckOGK/Specht*, § 823 BGB, Rn. 1235–36 (describing generally the sphere theory, or *Sphärentheorie*).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1237.

<sup>81</sup> *Id.* at 1238.

<sup>82</sup> *Id.* at 1237.

<sup>83</sup> *Id.* at 1241.

<sup>84</sup> Oberlandesgericht [OLG] [Higher Regional Court] Oct. 24, 1974, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 649, 650 (Ger.); KARL EGBERT WENZEL ET AL., DAS RECHT DER WORT- UND BILDBERICHTERSTATTUNG, HANDBUCH DES ÄUßERUNGSRECHTS 143–47 (4th ed. 1994); MATTHAIS PRINZ & BUTZ PETERS, MEDIENRECHT: DIE ZIVILRECHTLICHEN ANSPRÜCHE 73 (1999).

<sup>85</sup> BGH, Dec. 19, 1995, VI/ZR 15/95, [https://www.jurion.de/urteile/bgh/1995-12-19/vi-zr-15\\_95/](https://www.jurion.de/urteile/bgh/1995-12-19/vi-zr-15_95/).

protection of the private sphere.<sup>86</sup> Intrusions into the private sphere will be counterbalanced by other countervailing rights, usually speech rights invoked by the speaker.

Finally, there is the social sphere—the sphere in which the development of the individual personality comes into greatest contact with the outer world, particularly in work spaces and political fields.<sup>87</sup> The general personality rights receive the least amount of protection in this sphere.<sup>88</sup> When an individual places himself into the public, or involves himself in public matters, the balance between his personality rights and the other conflicting rights will usually come out in favor of the other rights.<sup>89</sup> True published statements regarding an individual's social sphere activities will usually receive greater weight than his personality rights, despite having a negative impact on his image.<sup>90</sup> Due to the high legal standard, it is unlikely that one will recover pecuniary damages here.<sup>91</sup>

#### IV. STATE ACTION IN FIGHTING FAKE NEWS

##### A. *Criminal Libel Statutes in the United States*

Convictions for criminal libel are extremely rare.<sup>92</sup> While only a small minority of states have statutes establishing criminal liability for libel, its enforcement is even rarer; in the period between 1965 and 1996, there were only fifty-two prosecutions implemented, with only a fraction of these proving guilt.<sup>93</sup> In the past, criminal libel prosecutions were more prevalent, but they met the stringent actual malice standard set

<sup>86</sup> *BeckOGK*, *supra* note 77, at 1243.

<sup>87</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] 2012, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 771, Rn. 16 f, 2012 (Ger.).

<sup>88</sup> *BeckOGK*, *supra* note 77, at 1247.

<sup>89</sup> *Id.* at 1248.

<sup>90</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2016, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3362, Rn. 15, 2016 (Ger.) (permitting reviews in online review portals concerning services, so long as the entry into the social sphere does not extend any further than necessary, as measured by the general interest in the information being published).

<sup>91</sup> *BeckOGK*, *supra* note 77, at 1248.

<sup>92</sup> Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 296–97 (2005).

<sup>93</sup> *Id.* (noting the abuse of the statutes in that many of the implemented criminal libel prosecutions were against political rivals and journalists who questioned the actions of police, prosecutors, and politicians).

forth in *New York Times Co. v. Sullivan*,<sup>94</sup> where the Court struck down Louisiana's criminal libel statute because it punished false statements made with mere common law malice.<sup>95</sup> Due to a wave of states either repealing or declaring such statutes unconstitutional following *Garrison v. Louisiana*, it was reported that only fourteen states had such statutes on the books, as of 2004.<sup>96</sup>

### B. Regulation of Obscenity and Other Content

In *Reno v. ACLU*, the Court was faced with determining whether a federal obscenity statute was an intrusion of the First Amendment right to free speech.<sup>97</sup> In striking down the statute, the Court explained that, rather than being a permissible time, place, or manner restriction on speech, the statute acted as a "content-based blanket restriction on speech . . . ."<sup>98</sup> The Court also clearly stated that the Internet is a medium receiving complete First Amendment protection, as opposed to its predecessors, radio and television.<sup>99</sup> Distinguishing the internet from these earlier media, the Court noted that "[e]ach medium of expression . . . may present its own problems," thus justifying regulation for traditional broadcast media.<sup>100</sup>

In 1997, when *Reno* was decided, the Court went to great lengths to explain how the Internet functions, mentioning that there were approximately 9.4 million host computers and forty

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<sup>94</sup> 376 U.S. 254 (1964); see also *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (explaining actual malice standard in greater detail).

<sup>95</sup> *Garrison*, 379 U.S. at 78.

<sup>96</sup> Carter, *supra* note 92, at 295–96.

<sup>97</sup> 521 U.S. 844, 872 (1997) (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)) (detailing the obscenity test as "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

<sup>98</sup> *Id.* at 868.

<sup>99</sup> *Id.* at 869–70.

<sup>100</sup> *Id.* at 868–69 (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)); see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 399–400 (1969) (detailing the extensive government regulation of radio and television broadcasts); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637–38 (1994) (explaining that regulation of television was justified based on the scarcity of available frequencies at the technology's inception); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989) (considering the "invasive" nature of particular media in determining its qualification for regulation).

million users at the time of the trial.<sup>101</sup> Considering these numbers, the Court emphasized that there was neither a centralized organization controlling the internet, nor any centralized means of blocking material on the web.<sup>102</sup> The nature of the Internet’s “vast democratic forums” was dispositive as to why the government supervision and regulation, which blanketed radio and television broadcasts, is virtually nonexistent in relation to the Internet.<sup>103</sup> This 1997 decision goes to show the rapid pace at which technology is changing and demanding more change in the jurisprudence; if this case were to be argued today, the justices would be faced with a modern algorithm-based internet that is highly intrusive into peoples’ homes and communication devices.

*C. The Right to Anonymity in the United States*

In 1988, the state of Ohio created a law prohibiting the distribution of anonymous campaign literature with the purpose of identifying persons who distribute materials containing false statements, but the statute contained no language limiting its application to fraudulent, false, or libelous statements.<sup>104</sup> Rather, the statute required disclosure for *every* political publication.<sup>105</sup> During that same year, a concerned citizen distributed a pamphlet regarding a local referendum on a school tax levy; it emphasized her views on a local school district vote, while not disclosing her identity.<sup>106</sup>

The Supreme Court, stating that anonymous pamphleteering has an honorable tradition of political advocacy, ruled that Ohio’s statute was an unconstitutional blanket ban on a particular category of speech; the State may punish fraud directly, but, instead, took a “blunderbuss approach.”<sup>107</sup>

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<sup>101</sup> *Reno*, 521 U.S. at 850.

<sup>102</sup> *Id.* at 853.

<sup>103</sup> *Id.* at 868–69 (mentioning as additional grounds for regulating radio and television, that they are substantially more “invasive” in peoples’ homes, and that internet content must be summoned and one typically does not encounter it “by accident”).

<sup>104</sup> OHIO REV. CODE ANN. § 3599.09 (West 2017); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 344 (1995).

<sup>105</sup> OHIO REV. CODE ANN. § 3599.09 (West 2017).

<sup>106</sup> *McIntyre*, 514 U.S. at 336.

<sup>107</sup> *Id.* at 357.



The *McIntyre* Court treated the identity of the speaker the same as the other contents within the document.<sup>108</sup> It cited a former decision saying “[o]f course, the identity of the source is helpful in evaluating ideas. But the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>109</sup> Additionally, the Court expressed its belief that the common man should not be underestimated, that people are intelligent enough to evaluate anonymous writings, and, once having done so, they may determine for themselves what was written responsibly, truthfully, and what has value.<sup>110</sup>

Based on these principles, social media users, as well as platform founders, in the United States are not required to disclose their identities.<sup>111</sup>

#### D. German Speech-Related Criminal Codes

German law may first approach cases of defamation, or other codified violations of personality rights, through an analysis of criminal liability. To give a few examples, the German Criminal Code, in § 185, prohibits insults arising through either malfeasance or nonfeasance, affecting another’s moral, social, and intellectual dignity.<sup>112</sup> The courts will make an initial determination as to whether the “insulting” content was a statement of fact or an opinion; for the purposes of analyzing fake news, only the statements of fact are relevant. Furthermore, insulting statements of fact are actionable only when they are untrue and made directly to the person being insulted; thus, insult is a plausible cause of action for combating fake news stories.<sup>113</sup> As mentioned above, § 823 paragraph 2 of the Civil Code enables civil recovery for the “breach of a statute that is

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<sup>108</sup> *Id.* at 348.

<sup>109</sup> *Id.* at 348 n.11 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) (internal quotation marks omitted).

<sup>110</sup> *Id.* at 348.

<sup>111</sup> *Differences Between Public and Private Domain Registration*, LINKEDIN (Dec. 1, 2012), <https://de.slideshare.net/virgomarble38/differences-between-public-and-private-domain-registration> (indicating that internet domain purchasers may avoid registration in a database by paying an extra “private registration” fee and providing an intermediary’s contact information. Furthermore, individuals may simply choose to submit false information; this is not prohibited by law).

<sup>112</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 185, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.).

<sup>113</sup> *Id.*

intended to protect another person”; it is through this connection with § 823 paragraph 2 that the statutes in this section afford civil recovery.<sup>114</sup>

Section 186 (*Üble Nachrede*) defines defamation as “assert[ing] or disseminat[ing] a fact related to another person which may defame him or negatively affect public opinion about him . . . .”<sup>115</sup> Section 186 is fundamentally similar to the *insult* cause of action, except that the damaging statements in § 186 are published to a third party.<sup>116</sup> Section 187 (*Verleumdung*) of the Criminal Code deals with aggravated cases, the cases where defamation occurs either intentionally or knowingly.<sup>117</sup> Defamation under § 187 requires the intentional or knowing dissemination of an untrue fact that defames another person, negatively affects public opinion about him, or endangers his creditworthiness.<sup>118</sup>

Interestingly, the German criminal punishments for defamation of politicians have an inverted policy of the broad protections of political speech in the United States. The United States Supreme Court made it more difficult for public figures to sue on speech-based claims, because “First Amendment freedoms need breathing space to survive,” and it wished not to chill valuable political speech.<sup>119</sup> Under the German Criminal Code,

<sup>114</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823, para. 2, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) (Ger.).

<sup>115</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 186, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.) (establishing a maximum penalty of a fine and one year imprisonment; the penalties may be elevated if the defamatory statement “was committed publicly or through the dissemination of writings”; truth is also a defense).

<sup>116</sup> Dinah Busse, *Straftaten gegen die Ehre – Beleidigung, Üble Nachrede, Verleumdung: §§ 185-187 StGB*, GANGWAY (Mar. 28, 2016), <http://gangway.de/straftaten-gegen-die-ehre-beleidigung-ueble-nachrede-verleumdung-%C2%A7%C2%A7-185-187-stgb/>.

<sup>117</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 187, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.); *see* STRAFGESETZBUCH [STGB] [PENAL CODE], § 11, para. 3, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.) (including “audiovisual media, data storage media, illustrations and other depictions” in the definition of “writings”).

<sup>118</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 187, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.) (establishing a maximum penalty of a fine and two years imprisonment; “if the act was committed publicly, in a meeting or through dissemination of written materials . . . [with] imprisonment not exceeding five years or a fine”).

<sup>119</sup> NAACP v. Button, 371 U.S. 415, 433 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)).

§ 188 establishes liability for defamation of people “in the political arena” if the offense burdens his public activities.<sup>120</sup> When done in the context of § 186 defamation, a defendant shall be sentenced to three months to five years imprisonment.<sup>121</sup> In the aggravated sense of § 187, when done intentionally, the term of imprisonment is between six months and five years.<sup>122</sup>

Finally, Germany is much more willing to implement bans on content regarding its national socialist past. Certain political parties and their associated symbols have been made strictly illegal.<sup>123</sup> Furthermore, one specific bit of content, Holocaust denial or diminution, is strictly prohibited.<sup>124</sup> While it is necessary for this speech, symbolism, or propaganda to be distributed in Germany to be subject to prosecution, even persons outside of Germany could be prosecuted if their content is found within Germany.<sup>125</sup>

#### *E. Anonymity in Germany*

The vast network of German privacy law guarantees extensive privacy rights to individuals on social media. For example, the German Teleservices Act (“TMG”) requires internet service providers to provide anonymous access to their service, to the furthest technological extent possible.<sup>126</sup> A 2014 Federal Supreme Court decision further restricted civil claimants’ access to defendants’ information, not permitting them to obtain others’ personal data unless fitting within the narrow parameters of the

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<sup>120</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 188, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.).

<sup>121</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 188, para. 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.).

<sup>122</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 188, para. 2, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.).

<sup>123</sup> GRUNDGESETZ [GG] [BASIC LAW], art. 21, para. 2, *translation at* [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/); STRAFGESETZBUCH [STGB] [PENAL CODE], § 188, para. 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.).

<sup>124</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 130, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/) (Ger.).

<sup>125</sup> Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, 8 GERMAN L.J. 173, 181–82 (2007); see also Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 12, 2000, 1 StR, 2000, 184/00 (sentencing defendant to ten months imprisonment for Holocaust denial on an Australian-based website).

<sup>126</sup> Telemediengesetz [TMG] [Telemedia Act], Feb. 26, 2007, BGBl. I at 179, § 13, para. 6, sentence 1 (Ger.).

TMG.<sup>127</sup> When plaintiffs file for injunctions against internet service providers to provide personal information, the other parties' identities may only be released for purposes of criminal law enforcement or in instances where they have contractually waived protection.<sup>128</sup> Without one of these elements present, internet service providers have no authority to convey personal information, even for civil claims for injury to personality rights.<sup>129</sup> Thus, since many of the violations of personal rights are also actionable crimes, one can go to the police or state prosecutor, make a criminal complaint, and ascertain the infringer's identity through these means.<sup>130</sup> Despite the difficulty in determining specific content creators, German law requires online providers to identify themselves, thus breaking down one link in the chain of anonymous speech.<sup>131</sup>

## V. PRIVATE CLAIMS IN FIGHTING FAKE NEWS

### A. *Speech Regarding Private Matters*

Tort law, particularly speech-based causes of action under tort, comes into direct conflict with the U.S. Constitution's fundamental rights. Defamation, particularly the attempt to weigh states' interests against the protections afforded by the First Amendment, has become a focal point in the Supreme Court's jurisprudence. The states' interests, in terms of defamation, consist of providing damages—general, special, or punitive—to individuals whose reputations were damaged through false statements. Traditionally, the people making these “defamatory” statements have used the First Amendment as a shield, in order to protect themselves from state-sanctioned

<sup>127</sup> BGH, July 1, 2014, VI ZR 345/13, <https://openjur.de/u/705049.html>.

<sup>128</sup> TMG, § 14, para. 2; TMG, § 15, para. 5, sentence 4; BGH, July 1, 2014, VI ZR 345/13, <https://openjur.de/u/705049.html>.

<sup>129</sup> BGH, July 1, 2014, VI ZR 345/13, <https://openjur.de/u/705049.html>.

<sup>130</sup> David Geßner, *Ansprüche bei Verletzung des allgemeinen Persönlichkeitsrechts*, DAVID GEßNER RECHTSANWALT (Sept. 10, 2014), <http://www.rechtsanwalt-gessner-berlin.de/ansprueche-bei-verletzung-des-persoenlichkeitsrechts/>.

<sup>131</sup> Telemediengesetz [TMG] [Telemedia Act], Feb. 26, 2007, BGBl. I at 179, § 5 (Ger.); Rundfunkstaatsvertrag [RStV] [INTERSTATE BROADCASTING AGREEMENT], July 31, 1991, § 55 para. 2, [http://www.dvtm.net/fileadmin/pdf/gesetze/13.\\_RStV.pdf](http://www.dvtm.net/fileadmin/pdf/gesetze/13._RStV.pdf) (requiring all providers, including website creators, to list a name, address, tax identification number, and other information on their Impressum pages).

remedies. Defamation remedies arose under common law and came into their modern form through a number of notable Supreme Court decisions.

Until the 1960s, defamation law in the United States was almost exclusively assumed by state courts and legislatures.<sup>132</sup> State libel laws often required a defamed individual to merely prove that there had been a written false publication that subjected him or her "to hatred, contempt, or ridicule."<sup>133</sup> Truth served as an absolute defense to claims of defamation; but, if the published statements were determined to be false, there was then a presumption of general injury to plaintiffs' reputations.<sup>134</sup> The common law presumed general damages because "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed."<sup>135</sup> In addition to presumed general damages, plaintiffs could also prove pecuniary loss or emotional distress to recover special damages, as well as common law malice to recover punitive damages. Defendants, on the other hand, were permitted to prove that their statements inflicted no reputational injury. However, a showing of this still would not preclude an award of nominal damages in any case of defamation *per se*.<sup>136</sup>

In 1964, the Supreme Court, in *New York Times Co. v. Sullivan*, made a ground-breaking decision, overturning 200 years of libel law.<sup>137</sup> The Court ruled that "public officials," suing on a claim for libel, could not satisfy their burden of proof by proving that there was a false and damaging publication, or the traditional common law requirements.<sup>138</sup> Rather, a public official

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<sup>132</sup> *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring).

<sup>133</sup> *Id.* Different from libel laws, slanderous statements were actionable *per se* only when they imputed "a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman." *Id.* at 766 n.1. All other slanderous statements, outside of these narrow *per se* categories, were actionable only with proof of special damages, often taking the form of material or pecuniary loss.

<sup>134</sup> *Id.* at 765.

<sup>135</sup> *Id.* (citing RESTATEMENT OF TORTS § 621 cmt. a (AM. LAW INST. 1938)).

<sup>136</sup> *Id.* at 765; *see also* RESTATEMENT OF TORTS § 569 cmt. b (AM. LAW INST. 1938) (noting that nominal damages primarily serve to vindicate plaintiffs by branding information false).

<sup>137</sup> *Dun & Bradstreet*, 472 U.S. at 766 (White, J., concurring) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964)).

<sup>138</sup> *N.Y. Times Co.*, 376 U.S. at 279–80.

would be barred from recovering damages, whether they be presumed, special or punitive, unless he were to prove “actual malice.”<sup>139</sup> The Court defined malice as a knowing falsehood or a reckless disregard for the truth.<sup>140</sup> If a public official, as a plaintiff, could overcome this very high standard of proof, he would then be able to recover whichever special damages that he was capable of proving; this would also allow him to request punitive damages.<sup>141</sup> *New York Times* was the first time that the Court ventured to constitutionalize the areas of libel and slander; this was based on its belief that the First Amendment required special protection for the “uninhibited, robust, and wide-open debate on public issues.”<sup>142</sup>

In *Gertz v. Robert Welch Inc.*,<sup>143</sup> the Court was faced with a defamation action made by a private individual over statements of public or general interest.<sup>144</sup> The Court held that these private individuals may not recover damages by only proving a false statement, regardless of how damaging it was to their reputation.<sup>145</sup> Rather, they must prove the additional element of “fault,” which, at a minimum, requires a showing of negligence.<sup>146</sup> Even when reaching this evidentiary threshold, damages must be proven, as opposed to the common law rule allowing them to be presumed.<sup>147</sup> And finally, the *Gertz* Court required that even these private individuals must satisfy the strenuous *New York Times* actual malice standard in order to recover punitive damages.<sup>148</sup> While *Gertz* gave the states guidance on defamatory statements of public or general interest, and how public figures should be distinguished from private figures, many questions still remained, especially in the area of private speech.

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Dun & Bradstreet*, 472 U.S. at 766 (White, J., concurring).

<sup>142</sup> *Id.* (internal quotation marks omitted) (quoting *N.Y. Times Co.*, 376 U.S. at 270); see also *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (extending the actual malice standard to all “public figures”).

<sup>143</sup> 418 U.S. 323, 323 (1974).

<sup>144</sup> *Id.* at 332.

<sup>145</sup> *Id.* at 347–48.

<sup>146</sup> *Id.* at 347.

<sup>147</sup> *Id.* at 349.

<sup>148</sup> *Id.* at 350.

The Supreme Court, in the 1985 case *Dun & Bradstreet Inc. v. Greenmoss Builders*, was once again faced with speech by private individuals on *matters of purely private concern*.<sup>149</sup> After a credit reporting agency sent a report to five of its subscribers, falsely reporting that a particular construction contractor had filed for bankruptcy, the credit reporting agency attempted to issue a corrective notice.<sup>150</sup> Because the report was false and so grossly misrepresentative of the contractor's finances, it brought a defamation action where a jury awarded presumed, special, and punitive damages at the trial level.<sup>151</sup> The Supreme Court, in a plurality opinion, ruled that "[i]n light of the reduced constitutional value of speech involving no matters of public concern . . . the state interest adequately supports awards of presumed and punitive damages—even absent a showing of actual malice."<sup>152</sup>

*B. Speech Regarding Public Matters*

In distinguishing whether speech is of public or private concern, the Court has generally defined speech on matters of public concern as speech "fairly considered as relating to any matter of political, social, or other concern to the community[.]"<sup>153</sup> Furthermore, it may be of public concern when the subject is of general interest and there is a value to the public.<sup>154</sup> In determining if speech is on a matter of public concern, the "inappropriate or controversial character" of the speech is irrelevant.<sup>155</sup> In further analyzing this type of issue, the Court must examine the content, form, and context of the speech.<sup>156</sup> No particular factor in this analysis is dispositive, and the court shall consider "what was said, where it was said, and how it was

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<sup>149</sup> 472 U.S. 749, 751 (1985).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 752.

<sup>152</sup> *Id.* at 761–63 (internal quotation marks omitted) (relying on the distinction that the speech at issue, similar to advertising, was motivated by a desire for profit and that there would be no societal value in false reporting to creditors).

<sup>153</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>154</sup> *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004).

<sup>155</sup> *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

<sup>156</sup> *Snyder v. Phelps*, 562 U.S. 443, 444 (2011).

said.”<sup>157</sup> This thorough analysis of the surrounding facts ensures that a trial court’s “judgment does not constitute a forbidden intrusion on the field of free expression.”<sup>158</sup>

C. *Other Causes of Action Found in the United States*

Similar to and often accompanying a defamation claim, is the tort of *false light* invasion of privacy. In order to satisfy a claim for false light, one must show that the defendant published something about the plaintiff, it portrayed the plaintiff in a false or misleading light, it was highly offensive or embarrassing to a reasonable person of ordinary sensibilities, and it was published with at least reckless disregard.<sup>159</sup> Take, for example, a newspaper publishing an article concerning child abuse in the Catholic Church, and its inclusion of a photo of a priest who, in fact, was completely innocent; despite there being no words directly accusing the priest of partaking in child abuse, the innuendo suffices to support a claim for false light.

False light cases protect plaintiffs from invasions of their privacy from misleading assertion, innuendos, and implications that are proven to be sufficiently false.<sup>160</sup> This cause of action is very fact-specific; it will not be satisfied when the false statement is shown to be immaterial, or if it would be perceived as “inherently incredible” to an ordinary person.<sup>161</sup> Some jurisdictions require that the publication constitute a private intrusion to the subject, not some matter of his public life.<sup>162</sup>

*Intentional infliction of emotional distress* (“IIED”) is treated as a “gap-filler” tort, providing a cause of action for particularly egregious conduct not covered by other torts.<sup>163</sup> This cause of action seeks to provide recovery for injury to plaintiffs’ mental and emotional well beings; because of the absence of physical

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<sup>157</sup> *Id.* at 454.

<sup>158</sup> *Id.* at 453 (citation omitted).

<sup>159</sup> RESTATEMENT (SECOND) OF TORTS § 651 (AM. LAW INST. 1977); Russell G. Donaldson, Annotation, *False Light Invasion of Privacy—Cognizability and Elements*, 57 A.L.R.4th 22 § 4[a] (1987) (noting that all false light causes of action arise from state statutory or common law).

<sup>160</sup> Donaldson, *supra* note 159, §§ 14–16.

<sup>161</sup> *Id.* § 17.

<sup>162</sup> *Id.* §§ 10–11.

<sup>163</sup> Catherine Palo, Annotation, *Proof of Intentional Infliction of Emotional Distress*, 136 Am. Jur. Proof of Facts 3d 175 § 2 (2013).



injury, IIED claims are “not favored in the law.”<sup>164</sup> Following the extreme and outrageous conduct, the plaintiff must prove that the harm is severe.<sup>165</sup> The “extreme and outrageous” element requires that the actor go beyond all limitations of decency and that his actions are atrocious and intolerable by community standards.<sup>166</sup> Along with the above-mentioned causes of action, states have provided a number of other causes of action to protect privacy rights; *unreasonable intrusion upon the seclusion of another*, *appropriation of another's name or likeness*, and *unreasonable publicity given to another's private life*.<sup>167</sup>

Outside of protecting peoples' privacy, most states' laws also afford a remedy for *trade libel* or *commercial disparagement*.<sup>168</sup> This cause of action requires a showing that a false statement was published with the intent to inflict pecuniary harm to another person's interests and that the statement was either known to have been false or the speaker acted in reckless disregard of its falsity.<sup>169</sup> Trade libel is distinguished from defamation because it requires the plaintiff to prove special damages by showing pecuniary loss, and does not permit immaterial damage elements, such as mental anguish.<sup>170</sup> In cases where the remarks exceed criticism of the plaintiff's goods and go further to imply business dishonesty, or that the plaintiff is incompetent, the plaintiff may sue for defamation.<sup>171</sup> In fact, a libel claim is strategically preferable because it does not require proof of special damages.<sup>172</sup>

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<sup>164</sup> *Id.* (providing examples of IIED, such as desecrating a corpse or otherwise behaving outrageously at a funeral or burial).

<sup>165</sup> RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

<sup>166</sup> *Andrews v. Staples the Office Superstore E., Inc.*, No. 7:11CV00037, 2013 WL 3324227, at \*15 (W.D. Va. July 1, 2013).

<sup>167</sup> *Donaldson*, *supra* note 159, § 10.

<sup>168</sup> *Id.* § 11(f).

<sup>169</sup> *Id.*

<sup>170</sup> *Guess, Inc. v. Superior Court*, 222 Cal. Rptr. 79, 82 (Cal. Dist. Ct. App. 1986).

<sup>171</sup> *See Rosenberg v. J.C. Penney Co.*, 86 P.2d 696, 702 (Cal. Dist. Ct. App. 1939).

<sup>172</sup> *Erlich v. Etner*, 36 Cal. Rptr. 256, 258–59 (Cal. Dist. Ct. App. 1964) (describing the difficulty for a plaintiff to satisfy a trade libel claim by having to identify particular customers who have refrained from dealing with him, along with specific instances of lost transactions).

## VI. NOTES ON PROCEDURE AND REMEDIES

For both domestic and foreign social media users, any claims against them can be based upon personal jurisdiction, having sufficient minimum contacts within a jurisdiction, or a state's long-arm statute, creating personal jurisdiction for out-of-state acts. For claims arising under federal law, usually related to election, intellectual property, or commercial trade issues, the federal courts may even exercise jurisdiction over foreign defendants with a showing that their contacts with the United States are sufficient to bring a defendant into court.<sup>173</sup>

A. *Preliminary Discovery*

Social media usage, especially its anonymity, has stirred controversy in the pleadings phase of defamation cases. Unaware of the online defamer's identity, plaintiffs are filing "John Doe" lawsuits with increasing frequency.<sup>174</sup> When a defamed plaintiff seeks to discover the identity of his defamer, he will have to satisfy a jurisdiction-specific test in order for a court to mandate an internet service provider to disclose a user's information.<sup>175</sup> As an example, some courts have chosen to follow the New Jersey Superior Court's requirement that a plaintiff: (1) make efforts to give online notice to the anonymous poster that he may be subject to a subpoena or application for order of disclosure, (2) directly quote the actionable online speech, (3) present evidence for a *prima facie* cause of action on the claims, and (4) make an argument to the court that the weight of the *prima facie* claims outweigh the poster's First Amendment anonymous speech protections.<sup>176</sup>

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<sup>173</sup> FED. R. CIV. P. 4(k)(2); *see also* Mwani v. Bin Laden, 417 F.3d 1, 13 (D.C. Cir. 2005) (exercising 4(k)(2) jurisdiction over Osama bin Laden).

<sup>174</sup> Jason C. Miller, *Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL'Y 229, 242–43 (2008).

<sup>175</sup> Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 YALE J. L. & TECH. 92, 114 (2012).

<sup>176</sup> *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001).

### B. *The Availability of Injunctions*

Injunctions, being equitable, not legal remedies, are generally not available in defamation cases for a number of important reasons. When an adequate legal remedy, such as damages, can be afforded, equitable remedies, such as injunctions, are precluded.<sup>177</sup> A number of courts have also denied the equitable remedy of an injunction because, they suggest, there may be a number of factual questions that should be determined by a jury; an equitable remedy, in these cases, would deprive the defendant of his Seventh Amendment right to a trial by jury.<sup>178</sup> And, perhaps most importantly, court orders permanently enjoining speech are prior restraints on speech, subject to the strictest constitutional scrutiny.<sup>179</sup>

### C. *The Communications Decency Act*

In other types of traditional media, media entities could be subject to liability for publishing and furthering a defamatory statement made by another party.<sup>180</sup> This concept applies to newspapers, book publishers, and broadcasters and does not have the same application to social media.<sup>181</sup> Congress passed § 230 of the Communications Decency Act (“CDA”), which protects social networks from liability if: (1) the defendant is a “provider or user of an interactive computer service”; (2) the complaint seeks to hold the defendant liable as a “publisher or speaker”; and (3) the action is based on “information provided by another information content provider.”<sup>182</sup> A benefit of the CDA is that it prevents the “chilling effect that regulation may have on internet speech.”<sup>183</sup>

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<sup>177</sup> W.E. Shipley, Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715 § 4(a) (1956).

<sup>178</sup> *Id.* § 5(b).

<sup>179</sup> *Alexander v. United States*, 509 U.S. 544, 550 (1993). *But see* *W. Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 870, 198 N.Y.S.2d 196, 199–200 (Sup. Ct. Rockland Cnty. 1960) (allowing injunctions in cases of fraud, other violations of the law, or egregious intrusions into others’ property rights).

<sup>180</sup> RESTATEMENT (SECOND) OF TORTS § 581(2) (AM. LAW INST. 1977) (extending liability to third persons who deliver or transmit defamatory matter, while knowing of, or having constructive knowledge of its defamatory character).

<sup>181</sup> Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 430, 466 (2013).

<sup>182</sup> 47 U.S.C. § 230(c) (2012).

<sup>183</sup> Angelotti, *supra* note 181, at 485 (quoting Allison E. Horton, Note, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1305 (2009)).

And because Twitter and other social media outlets are identifiable as “provider[s] of [an] interactive computer service,” they receive complete immunity from defamation suits over content created by their users.<sup>184</sup>

#### D. SLAPP Actions

Strategic Lawsuits Against Public Participation (“SLAPP suits”) refer to instances of aggressive plaintiffs suing individuals or groups to wrongfully deter their speech on public issues.<sup>185</sup> These occur in instances where people rightfully criticize other parties regarding public issues, then plaintiffs with disparate resources seek to silence defendants who will likely not have the resources to represent themselves from defamation claims.<sup>186</sup> In a recent phenomenon, thirty-one states have created “anti-SLAPP” statutes, aiming to abate meritless lawsuits, which tend to chill constitutionally protected speech.<sup>187</sup> The anti-SLAPP statutes vary in substance and scope in every jurisdiction but they generally seek to reimburse lawyer’s fees and institute court sanctions.

### VII. GERMAN CIVIL LIABILITY AND DAMAGES

Defamation claims in Germany are initially analyzed similarly to those in the United States: the courts first seek to make the crucial determination of whether the statements in question are statements of fact or statements of opinion.<sup>188</sup> When

<sup>184</sup> *Id.* at 487 n.349 (citing 47 U.S.C. § 230(c) (2012)); *see, e.g.*, *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1137 (E.D. Va. 1997) (prohibiting recovery against interactive computer service provider for negligent distribution of defamatory material on internet bulletin board, because CDA precludes recovery against defendants who are not publishers or speakers), *aff’d* 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

<sup>185</sup> Rodney A. Smolla, Annotation, § 9:107. *SLAPP Suits and Anti-SLAPP Legislation*, 2 L. OF DEFAMATION § 9:107 (2d ed. 2017).

<sup>186</sup> *Id.*

<sup>187</sup> *State Anti-Slapp Laws*, PUBLIC PARTICIPATION PROJECT, <https://anti-slapp.org/your-states-free-speech-protection/> (last visited Apr. 3, 2018) (noting that Colorado and West Virginia have similar speech protections arising from their common law); *see, e.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2017).

<sup>188</sup> Gregory J. Thwaite & Wolfgang Brehm, *German Privacy and Defamation Law: The Right To Publish in the Shadows of the Right to Human Dignity*, 8 EUR. INTELL. PROP. REV. 336, 343–44 (1994) (explaining that while the analysis of statements of fact and opinion is similar in both countries, the actual analysis of whether a statement is defamatory “plays a more subordinate role in German practice”). Bruns, *supra* note 9, at 283–84.

the statement is found to be a mere expression of opinion, the Basic Law Article 5(1)'s Free Speech Clause will provide protection from liability.<sup>189</sup> Only in the rare case of malicious insult (*Schmähkritik*) can a statement of opinion be legally actionable.<sup>190</sup> If a statement is determined to have been a statement of fact, on the other hand, then the court will go on to make the further determination as to whether the plaintiff can adequately prove its falsity.<sup>191</sup>

In cases of defamatory publications, there is a duty to conduct a reasonable investigation on the subject matter being published.<sup>192</sup> Even if a defendant were to publish a defamatory statement of fact, it could be privileged if the defendant undertook a reasonable investigation.<sup>193</sup> As for other significant differences between the two systems, there is no distinction between libel and slander in Germany and presumed damages are not available; plaintiffs may only recover actual, specifically-proven damages of economic loss.<sup>194</sup>

Section 823 paragraph 1 of the Civil Code establishes compensatory liability for infringements against the general personality rights.<sup>195</sup> Section 823, paragraph 2 extends this *civil* liability to those in "breach of a statute that is intended to protect another person."<sup>196</sup> Though, as a limitation in these particular cases, if the statute strictly prohibits certain behavior—regardless of fault—fault must still be established in order to recover compensatory damages.<sup>197</sup> Furthermore, § 824 of the Civil Code extends civil liability to the untruthful dissemination of a fact causing harm to another's credit or livelihood.<sup>198</sup>

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<sup>189</sup> GRUNDGESETZ [GG] [BASIC LAW], art. 5, para. 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/); see Bruns, *supra* note 9, at 286.

<sup>190</sup> Bruns, *supra* note 9, at 286.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 286–87.

<sup>195</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823, para. 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) (Ger.); see also Bruns, *supra* note 9, at 285–86 (describing these as "constitutionally granted personality right[s]").

<sup>196</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823, para. 2, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) (Ger.).

<sup>197</sup> *Id.*

<sup>198</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 824, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) (Ger.) (providing

Injunction and deletion of published material, another fundamental civil remedy in conjunction with § 823 damages, may also be sought by plaintiffs; § 1004 of the Civil Code establishes that “[i]f the ownership is interfered with . . . the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.”<sup>199</sup> Prohibitory injunctions are only available upon full adjudication and a court’s final judgment, whereas temporary injunctions may be issued in the time leading up to litigation.<sup>200</sup> While this facially applies to impairments of physical property rights, the courts have extended § 1004 injunctions to instances where the general personality rights are affected as well.<sup>201</sup> An injunction may be issued in a broad spectrum of instances, including: deliberately untrue or incomplete reports affecting an individual’s honor, other damaging statements, extreme criticism, unauthorized or manipulated photography, and other intrusions into individuals’ privacy.<sup>202</sup>

In 1958, the Federal Supreme Court made another landmark ruling in the *Herrenreiter* decision.<sup>203</sup> The case concerned the usage of a well-known equestrian’s image by the producer of an aphrodisiac in an advertising poster.<sup>204</sup> The plaintiff, claimed that the poster’s usage of his image subjected him to ridicule and humiliation, but he did not suffer any tangible pecuniary loss.<sup>205</sup> The Court, in reaffirming previous cases’ implementation of civil liability for general personality rights, extended this liability to immaterial damage.<sup>206</sup> The *Herrenreiter* Court addressed protection of the “inner realm of the personality,” the individual’s

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an exception for individuals who have a justified interest in making such communications).

<sup>199</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1004, para. 1, translation at [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) (Ger.).

<sup>200</sup> Thwaite & Brehm, *supra* note 188, at 349 (noting the courts’ hesitancy to grant injunctions preventing the initial publication of possibly defamatory material due to the lack of available information as well as the high probability that it is conflicting with the Basic Law).

<sup>201</sup> HK-BGB/Hans Schulte-Nölke, 9. Aufl. 2016, BGB § 1004 Rn. 1–13 (citing Kommentar zum BGB/Jauernig, 16. Aufl. 2015, BGB § 823 Rn. 64–91).

<sup>202</sup> MüKoBGB/Baldus, 7. Aufl. 2017, BGB § 1004 Rn. 32–33.

<sup>203</sup> 26 BGHZ 349 (Ger.).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

basis for his self-determination, and explained that its protection “would be in great part illusory” without compensation for immaterial damages; thus, such damages were allowed.<sup>207</sup> The *Herrenreiter* Court also took the opportunity to extend “by analogy” pain and suffering damages to infringements of the general personality rights.<sup>208</sup>

A. *German Procedure and Remedies: The Pretrial Discovery Void*

Pretrial discovery is not available to German plaintiffs, so they must use other means to gather information in preparation of bringing a claim. A common method is to commence a separate action for information.<sup>209</sup> Another option is the so-called “step-action” (*Stufenklage*) where the request for information is filed alongside a claim for a particular remedy.<sup>210</sup> The step-action approach shares some similarities with the U.S. system in that there is a procedural bifurcation where the basis for the evidence is first argued, and, following its admission, the courts proceed on the merits of the underlying claim.<sup>211</sup>

Seeking other's information can also face the hurdle imposed by the data protection and media codes of the sixteen German States (*Bundesländer*).<sup>212</sup> The aforementioned right to informational self-determination has come to set a baseline standard of data protection.<sup>213</sup> Because the right to informational self-determination protects an individual's right to know who possesses his information, and to what extent, the courts will have to balance the constitutional value of disbursing defendants' information against the interest of facilitating a defamation or other claim.<sup>214</sup> Unlike in the United States, plaintiffs are not

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*; BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 253, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) (Ger.).

<sup>209</sup> Bruns, *supra* note 9, at 293; BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 666, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p2917](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2917) (Ger.).

<sup>210</sup> Bruns, *supra* note 9, at 293 (citing ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE CODE], § 254, *translation at* [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html#p0939](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0939) (Ger.)).

<sup>211</sup> Bruns, *supra* note 9, at 293.

<sup>212</sup> *Id.* at 294.

<sup>213</sup> *See* BVerfG, 1 BvR 209, 269, 362, 420, 440, 484/83, Dec. 15, 1983, <http://www.servat.unibe.ch/dfr/bv065001.html>.

<sup>214</sup> *Id.*

required to present a *prima facie* case, but only to demonstrate the reasonable plausibility that the alleged defamatory statement is false.<sup>215</sup>

### B. Lawyer's Fees

One can draw a large distinction between the allocation of lawyers' fees in Germany and the United States. Germany's "loser pays" system requires that the unsuccessful civil litigant compensate the other party for their statutory costs and fees.<sup>216</sup> It is generally agreed that the loser-pays principle reduces frivolous law suits.<sup>217</sup> The principle also makes it more economically viable to institute meritorious small claims, which would otherwise go unaddressed due to their prohibitory legal costs.<sup>218</sup> This system is particularly well suited for Germany, where lawyer's fees are established by statute.<sup>219</sup> As another fundamental contrast to the U.S. system, German law does not allow for attorneys to collect contingency fees.<sup>220</sup> While contingency fee agreements provide incentives for U.S. lawyers to push for the best possible outcome for their clients, they also disincentivize attorneys from taking on small claims cases. Thus, the German statutory scheme of loser pays provides for better economic incentives when dealing with smaller potential claims.

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<sup>215</sup> *Id.*

<sup>216</sup> ZIVILPROZESSORDNUNG [ZPO] [CODE CIVIL PROCEDURE], §§ 91, 788, translation at <http://www.gesetze-im-internet.de/zpo/> (Ger.).

<sup>217</sup> See Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 59–60 (1982).

<sup>218</sup> Marie Gryphon, *Assessing the Effects of A "Loser Pays" Rule on the American Legal System: An Economic Analysis and Proposal for Reform*, 8 RUTGERS J.L. & PUB. POL'Y 567, 583 (2011).

<sup>219</sup> RECHTSANWALTSVERGÜTUNGSGESETZ [RVG] [ATTORNEY REMUNERATION LAW], May 5, 2004, BGBl I at 3799, § 2 (Ger.); see also RECHTSANWALTSVERGÜTUNGSGESETZ [RVG] [ATTORNEY REMUNERATION LAW], May 5, 2004, BGBl I at 3799, § 3 (Ger.) (indicating that lawyers are permitted to negotiate higher fees).

<sup>220</sup> BUNDESRECHTSANWALTSORDNUNG [BRAO] [FEDERAL ATTORNEYS CODE], Jan. 8, 1959, BGBl I at 3618, § 49 (Ger.).



*C. Determining the Proper Defendant*

The German Teleservices Act functions similarly to the CDA with regards to liability for service providers. It states that service providers are only responsible for the content that they generate and they are not obliged to actively monitor and investigate any information transmitted through or stored on their platforms.<sup>221</sup> Here is where the similarities end; once a German service provider is notified of unlawful content, it must take immediate action to remove or block it. Failure to do so can require an injunction or even possibly damages against the service provider.<sup>222</sup>

In response to the Syrian refugee case and sensational stories of Fake News during the 2016 U.S. presidential election, German politicians hurried to pass the Network Enforcement Act.<sup>223</sup> Recently going into effect, it requires the immediate removal of any “hate crime and other illegal content” by service providers.<sup>224</sup> A failure to delete flagged “obviously illegal content” within twenty-four hours could result in fines in excess of fifty million Euros.<sup>225</sup> The Network Enforcement Act, which requires social networks to determine the truth as well as the legality of content, has naturally been met with heavy criticism and is certain to face scrutiny in the courts.<sup>226</sup>

## CONCLUSION

With such a broad array of available legal options, most fake news publications still go unchecked. As seen in the case of the Syrian refugee, fighting fake news in social media can be compared to falling into a quicksand pit; the harder you push to

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<sup>221</sup> Telemediengesetz [TMG] [Telemedia Act], Feb. 26, 2007, BGBL. I at 179, § 7 (Ger.).

<sup>222</sup> LG Würzburg, Judgment, July 3, 2017, 11 O 2338/16 UVR, <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2017-N-103822?hl=true&AspxAutoDetectCookieSupport=1> (Ger.) (noting disparity on the availability of injunctions between the German and European jurisprudence, but nonetheless advising that the German jurisprudence be followed).

<sup>223</sup> Netzwerkdurchsetzungsgesetz [NETZDG] [NETWORK ENFORCEMENT ACT], Sept. 1, 2017, BGBL I at 3352 (Ger.).

<sup>224</sup> Josie Le Blond, *In Germany, A Battle Against Fake News Stumbles into Legal Controversy*, STOP FAKE (June 2, 2017, 4:32PM), <http://www.stopfake.org/en/in-germany-a-battle-against-fake-news-stumbles-into-legal-controversy/>.

<sup>225</sup> *Id.* (allowing a seven-day period to delete infringing content that is not so clear as to its legality, thus requiring more time for consideration).

<sup>226</sup> *Id.*

get out, the deeper you sink. The young refugee's lawsuit only served to further publicize the original lies that had caused him reputational harm. With the intention of avoiding this "quicksand phenomenon," the owners of Comet Ping Pong pizzeria have, at least until now, declined to pursue a legal remedy.<sup>227</sup>

This Article demonstrated the unique approaches in the United States and in Germany for fighting fake news: The U.S. remedies tend to wait for an injury, then compensate for it, whereas Germany is much more willing to directly address the speech's content and provide other remedies. Due to the difficulty in identifying online speakers, both systems often fall short in providing remedies for injured reputations, among the numerous other injuries. Speech-related law was transformed following the invention of the printing press and radio and television. Similarly, the recent social media revolution will also require a suitable legal evolution.

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<sup>227</sup> Benjamin Freed, *Comet Ping Pong Has Legal Options, But They Won't Make "Pizzagate" Go Away*, WASHINGTONIAN (Dec. 9, 2016), <https://www.washingtonian.com/2016/12/09/comet-ping-pong-has-legal-options-but-they-wont-make-pizzagate-go-away-entirely/>.